

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CIVIL DIVISION
CLAIM NO. HCV 1219/2004

BETWEEN	GEORGIA MESSAM	CLAIMANT
AND	CLIVE MORRIS	FIRST DEFENDANT
AND	MILTON WILLIAMS	SECOND DEFENDANT

IN OPEN COURT

Sheldon Codner for the claimant
Aon Stewart instructed by Archer, Cummings and Company for Milton Williams

TORT OF WRONGFUL APPROPRIATION OF PERSONALITY - MEASURE
OF DAMAGES FOR SUCH A BREACH - BREACH OF CONTRACT

December 2, 2009, January 22 and March 19, 2010

Sykes J

1. Hardcopy is a publication dedicated to documenting the party and dancehall scene of Jamaica. In order to meet the demands of its loyal fans, it has pictures and articles depicting current dancehall events and fashions. It even has a section know as 'The Buffer Zone.' This section, apparently is used exclusively for displaying photographs of young, attractive women who wish to display their grace and beauty (covered of course).
2. The caption of that section of the paper where these special ladies are displayed makes the point better than I possibly could. It reads:

There is a special place reserved for ladies who are endowed with that special feature that makes them highly desirable and attractive. We call that place "The Buffer Zone."

3. At the bottom of the page are these words:

Do you belong in THE BUFFER ZONE! Give us a call and we'll put you there! WARNING! No artificial enhancement allowed. (We check for authenticity)

4. Between these two sections pictures of young women are placed. Miss Messam's picture appeared in this section of the paper. She did not give permission for her picture to be used in this manner.
5. The circumstances that led to the publication of her photograph are not in dispute. In March 2004, Miss Georgia Messam went to a party at premises near Eastwood Park Road in the parish of St. Andrew. While there, she saw Mr. Clive Morris, a photographer, who was known to be a photographer for Hardcopy. She engaged his services to take two pictures of her to send to her fiancée who was overseas at the time. Miss Messam testified that she explained to Mr. Morris the need for utmost discretion in the matter because the pictures were to be provocative.
6. Mr. Morris agreed to take the pictures. Miss Messam and Mr. Morris repaired to a secluded part of the property where the pictures were taken. Again, it was emphasised to Mr. Morris that the pictures were for private use and on no account were they to be placed in the public domain.
7. The pictures were taken but they were not delivered to Miss Messam as agreed. Unknown to her, Mr. Morris had handed the pictures over to Mr. Milton Williams, the editor of Hardcopy. The pictures were published. It was this publication that has precipitated this claim.
8. When this development came to the attention of Miss Messam she called Mr. Morris who told her that it was Mr. Williams who took the pictures from him. She there upon called Mr. Williams. Mr. Williams, said she, was apologetic.
9. Mr. Morris did not give any evidence at the trial because judgment was entered against him on July 13, 2004, and it has not been set

aside. He had not filed any acknowledgment of service or defence and consequently is unable to participate in the trial.

10. The rest of evidence comes from Mr. Williams. He stated that Mr. Morris had provided him with photographs for use in the publication in which Miss Messam appeared. Mr. Williams said that Mr. Morris told him that the pictures of Miss Messam were taken in a public place. He also added that he looked at the photograph and saw what appeared to be a parking lot and concluded that it was indeed a public place.
11. There is another bit of evidence that comes from Mr. Williams. He says that Mr. Morris was, at the material time, a freelance journalist and not a member of staff. He explained that Mr. Morris would take photographs to him and from those brought, he (Williams) would select those suitable for publication and pay him for them. Presumably this was intended to negate any finding against Mr. Williams on the basis of vicarious liability.

The cause of action

12. It is in these circumstances as outlined above that Miss Messam launched her claim for compensation.
13. I must say that the pleading in the claimant's case was not helpful. It seems that the pleader could not make up his or her mind about the basis on which the case would be projected. For example, in the claim form, Mr. Clive Morris, the first defendant and photographer is said to have committed the tort of appropriation of personality but in the particulars of claim, the expression 'appropriation of personality' is not even mentioned, instead, it appears that the case against Mr. Morris is one of breach of contract. Indeed, paragraphs 7 and 9 of the particulars are about allegations of breach of contract. The particulars of the alleged breach of contract against Mr. Morris are pleaded as follows in paragraph 7:
 - a. On the day of March 2004, the claimant entered into an agreement with the first defendant whereby it was agreed inter alia that:

- i. the first defendant would photograph the claimant;
- ii. the first defendant would be paid for his photography service;
- iii. the said photographs were to be the sole property of the claimant and it was expressly agreed that having regard to the nature of the photographs the first defendant would treat them with the utmost privacy and confidentially and would forward them to the claimant solely.

14. Having done this, the pleader in the claim form and in paragraph 4 of the particulars of claim uses language more commonly found in defamation actions. The defendants are accused of having 'brought the claimant into ridicule, odium and contempt in the minds of right thinking citizens of Jamaica'.

15. To compound the problem, the claim form and particulars of claim allege negligence against Mr. Williams. The general allegation is that Mr. Williams 'negligently published or caused and/or permitted to be published the image of the claimant in a most compromising, degrading, humiliating and embarrassing position without taking due care that the claimant consented or authorised the said publication' (see para. 10 of particulars of claim). The particulars of negligence alleged, in paragraph 10, are that Mr. Williams:

- a. fail[ed] to take the necessary steps to ascertain that the claimant had consented to the publication of her said image;
- b. fail[ed] to put in place a system whereby the claimant would sign an authorization or consent for her said image to be published;
- c. fail[ed] to obtain the claimant's consent or authorization to the said publication;

d. publish[ed] the said image of the claimant, recklessly, carelessly and without due regard to the issue of the consent and/or authorization of the claimant's consent and/or authorization.

16. The breach is said to have occurred when Mr. Morris took the pictures to Mr. Williams who then published them in the Hardcopy publication. All this took place without the consent of Miss Messam.

17. It seems that the pleader had some difficulty making up his or her mind whether he or she would go for defamation, or the tort of appropriation of personality, or negligence. Paragraph four of the particulars of claim reads in part:

The said publication of the claimant in the said tabloid by the defendants has caused the claimant great embarrassment, humiliation and distress and has brought the claimant into ridicule, odium and contempt in the minds of right thinking citizens of Jamaica and the international community where the tabloid is distributed. The said publication of the claimant by the defendant was done for the financial gain or commercial advantage of the defendants.

18. A claim in defamation would have had its problems given that Miss Messam agreed for the pictures to be taken. Thus truth would have been a defence available to the defendants.

Negligence

19. It is true that the forms of action were abolished but that does not mean that precise legal thought is unnecessary. Establishing the ingredients of a claim is vital in order to determine, firstly, what is being alleged, and secondly, whether the allegations are sufficient to ground a cause of action.

20. In this particular case, there is a claim in negligence. I must confess that in light of the Jamaican Court of Appeal's in *S & T Distributors*

Ltd v C.I.B.C. Jamaica Ltd S.C.C.A. No. 112/04 (July 31, 2007) the claim in negligence is not sustainable. The court has repudiated the approach of Lord Wilberforce in *Anns v London Borough Council* [1977] 2 All ER 492, 498g-499b and opted for a cautious approach. In S & T, the court indicated that when novel claims in negligence are being made, whether the new claim is accepted is to be decided by reference to previous decisions to see if the law has recognised a similar tort and if yes, then there is the process of reasoning by analogy to see whether the new tort can be accepted.

21. According to Harris JA, *Anns* placed the law of negligence in confusion by proposing that in considering whether tortious liability in negligence should be imposed the court should decide whether (a) the claimant and defendant are sufficiently proximate for liability to be imposed and then (b) decide whether there are any policy reasons why liability should be negated. Her Ladyship suggested that in place of this 'confused' approach, the court

...must ascertain and first be satisfied, that, in a particular case the law recognises the existence of a duty of care and then decide whether such a duty of care should be imposed on a wrong doer. It follows therefore, that in considering a claim, the court should not only make inquiry into the nature of the relationship between the parties but also address the question of foreseeability and thereafter decide whether it is just and reasonable to impose a duty of care on a defendant. Liability, if imposed must directly or by analogy fall within the scope of one of the established categories of negligence. (page 34)

22. It is difficult to see the difference between Lord Wilberforce saying that liability should not be imposed if there are policy reasons negating liability and Harris JA saying that liability should not be imposed unless it is just and reasonable to impose a duty of care. It would seem to me that in order to decide whether it is just and reasonable to impose liability must necessarily be informed by policy considerations even if one does not wish to expressly acknowledge that this is the case.

23. The claimant, in the instant case has not demonstrated that his case falls, directly or by analogy, into any established category of negligence. Therefore, the claim in negligence against Mr. Williams fails.

Wrongful appropriation of personality

24. Mr. Codner has submitted that the tort of wrongful appropriation of personality should be recognised and applied in this case. He cites a number of cases from Jamaica, Canada and the United Kingdom. He relied more on the Canadian cases because some courts there have explicitly recognised the tort. The English courts have been reluctant to embrace this new tort.

25. This new tort has been recognised in this jurisdiction by Clarke J in *The Robert Marley Foundation v Dino Michelle Foundation* (1994) 31 JLR 197. In that case, his Lordship recognised that the tort of wrongful appropriation of personality existed and applied it in Jamaica. That case involved a dispute between two commercial entities using the image and likeness of the Honourable Robert Nesta Marley O.M. The person whose personality was being used was not a party to the action and this may explain why Clarke J explained himself in the way that he did. Clarke J. held that the tort 'consists of the appropriation of a celebrity's personality (Usually in terms of his or her name and likeness etc.) for the financial gain or commercial advantage of the appropriator, to the detriment of the celebrity or those claiming through or under him' (see page 206I).

26. Clarke J relied on Canadian authorities for his conclusion. The highest Canadian judicial authority that has explicitly considered this tort is the case of *Krouse v Chrysler Canada Ltd* 40 DLR (3d) 15 decided by the Court of Appeal of Ontario. In that case, the claimant failed in his attempt to recover damages for the use of his image. Despite the failure to secure a remedy, Estey JA accepted that changing times required the common law, as it has always done, to adapt. His Lordship observed that 'the extent to which customs of the community and commercial practices change so radically over a relatively short period of time, sometimes requiring modification in the application of recognized legal doctrines to meet these new circumstances.' His

Lordship ultimately concluded that 'from the foregoing examination of the authorities in the several fields of tort related to the allegations made herein that the common law does contemplate a concept in the law of torts which may be broadly classified as an appropriation of one's personality.'

27. The tort should not be used, unnecessarily to stifle the press or indeed anyone who may wish to disseminate information that is factually true and accurate. For this reason Estey J.A. in *Krouse* warned that:

The danger of extending the law of torts to cover every such exposure in public not expressly authorized is obvious. Progress in the law is not served by the recognition of a right which while helpful to some persons or classes of persons turns out to be unreasonable disruption to the community at large and to the conduct of its commerce.

28. Since the judgment in *Krouse*, the Canadian courts have sought to define the boundaries of the tort. Lederman J, of the Ontario Court of Justice, in *Gould Estate v Stoddart Publishing* 30 O.R. (3d) 520 observed that in Canada the courts had made a distinction between using the image of the person in such a manner so as to suggest that the person endorsed or approved the good, service or product with which the image was associated on the one hand and where there is no endorsement association. If there was no 'endorsement-type' situation then the tort would not be established.

29. This conclusion of Lederman J is different from that of Henry J. Henry J of the Ontario Supreme Court in the case of *Athans v Canadian Adventure Camps* 17 O.R. (2d) 425. His Lordship concluded that the tort is not restricted in the way suggested by Lederman J. Henry J, took the view, that despite the fact that the evidence did not show that the picture of the claimant was used in a such a way to suggest that he (the claimant) endorsed or was in any associated with the camp which the defendant used the picture to advertise, the crucial point was that the defendant used the image, in a commercial

enterprise thereby infringing the claimant's right to market his image. Henry J held that:

The commercial use of his representational image by the defendants without his consent constituted an invasion and pro tanto an impairment of his exclusive right to market his personality and this, in my opinion, constitutes an aspect of the tort of appropriation of personality. This conduct gives rise to an action sounding in tort that is separate and distinct from any action based on infringement of trademark or copyright, should that exist.

30. Henry J was giving preeminence to the right to market one's personality. This, for his Lordship, was the touchstone of liability.

31. Messam J of the British Columbia Supreme Court in *Joseph v Daniels* 4 B.C.L.R. (2d) 239 seems closer to the view of Henry J than that of Lederman J. Messam J stated:

From my review of the authorities I have concluded that it is the unauthorized use of a name or likeness of a person as a symbol of his identity that constitutes the essential element of the cause of action. The cause of action is proprietary in nature and the interest protected is that of the individual in the exclusive use of his own identity insofar as it is represented by his name, reputation, likeness or other value. For the defendant to be found liable, he must be taking advantage of the name, reputation, likeness or some other component of the plaintiff's individuality or personality which the viewer associates or identifies with the plaintiff.

32. Messam J therefore seems to be saying that in order to establish the tort, it is not sufficient to establish that there was an unauthorized commercial use of the personality but also the viewer must be able to connect the image to a specific person. I should point out that in the

case before Messam J, the image used was the torso of the claimant which was not sufficiently unique or distinct to that the viewer would connect the torso with the claimant, thus his claim failed.

33. It is important to observe that neither Henry J nor Messam J required that the claimant needs to be a celebrity before the tort can be grounded. I agree with this. Therefore, I do not agree with Clarke J so far as he suggests that the tort is or may be restricted to celebrities although it is true to say that celebrities may well have an easier task of establishing the tort. My reasons for taking this position are these. The tort, in my view, targets wrongful commercial use of the personality. The tort is not designed to protect celebrities. It is the loss of marketing one's image that is at the heart of the matter. If the fact of whether or not the personality is a celebrity is deemed important, then in my view, that fact should go to the quantum of damages since, undoubtedly, a celebrity may command higher fees for the use of his image.

34. Although it has been said that the tort is based on the idea that the person, celebrity or not, would have lost out on the opportunity to market his or her image with the measure of damages being what the person would have been paid had he or she been contracted to use his or her image, it should not be thought that the measure of damages is necessarily limited to what the person lost by not having the opportunity of using his image as he sees fit. The person, although not suffering a loss, may well be able to point to a gain by the tortfeasor leading to the possibility of a gain-based approach to the measure of damages. A non-celebrity may well be able to establish a gain to the tortfeasor that exceeds any contractual price the claimant could have secured for the use of his or her image.

35. I also disagree with Clarke J because I am not convinced that it is necessary to prove that there was a detriment to the celebrity or those claiming through or under him before the tort can be established. The authorities cited by his Lordship do not suggest that detriment is a necessary ingredient of the tort.

Has the tort been made out in this case?

36. The answer to this depends in part on the pleadings and in part on the evidence. It is not the name that the pleader gives to his cause of action that is important but what facts he or she actually alleges in the particulars of claim.

37. Although the particulars of claim is cast in a manner more suited for defamation cases - the concept of negligence was thrown in - it is fair to say the tort of wrongful appropriation of personality has been pleaded. It is alleged that the image of Miss Messam was used in the publication and there is no doubt that the publication was for commercial distribution.

38. Mr. Williams contends in his defence that the claimant is not a public figure and has no fame to which she can lay claim. I have endeavoured to point out the tort does not depend on the fame or otherwise of the person, but rather on whether their image has been exploited commercially without his or her consent.

Analysis of the evidence

39. Miss Messam's personality was used by Mr. Williams in the magazine. Mr. Williams raised the issue, in his defence, of whether he should be sued in his personal capacity or in his capacity as editor of Hardcopy. What is clear from the evidence is that it was he who personally authorised the use of the picture in the magazine. He it was who took the pictures from Mr. Williams. He can be sued in his personal capacity.

40. It is common ground that Miss Messam did not give permission for her image to be used in any publication of any type. It is also common ground that the full face of Miss Messam was shown so that readers who knew her would know that it was her.

41. It is common ground that Hardcopy was produced for commercial distribution.

42. The fact that Miss Messam may not be a celebrity nor has no national acclaim is not a bar to the action.

43. It is my view that the picture was used in such a manner so as to suggest that Miss Messam approved of the magazine and was giving her endorsement to it and its activities. Her picture was published in a section of the paper headed 'The Buffer Zone'. The importance of this has been explained already.

44. I interpret the evidence in the case to mean that this section of the publication is to be reserved for those persons who wish to be placed in this section of the paper. It is for those who approve or at the very least agree with the type of publication and wish to be used to advertise the magazine. Miss Messam expressed no such desire. She did not endorse the magazine. The endorsement aspect of the matter strengthens Miss Messam's claim but is not a necessary part of the tort.

45. On the question of damages, the cases make it clear that the quantum of damages is what the claimant could have earned had she been contracted to take the photograph for the specific use for which it was used. Mr. Codner submitted that I should measure the damage in this case using defamation cases. This could not be right because Miss Messam in truth did pose for the photograph. No evidence was presented to the court on the measure of damages in the tort of wrongful appropriation of personality. Miss Messam therefore gets nominal damages of JA\$1.00. Costs are awarded to her.

Breach of contract

46. Judgment was entered against Mr. Morris. This trial also involves an assessment of damages. Again, it appears from the cases that the measure of damages is loss Miss Messam suffered by being deprived of the opportunity to market her photograph. No evidence of this was presented. Nominal damages of JA\$1.00 is awarded. Costs to Miss Messam.

Conclusion

47. Miss Messam fails in her negligence claim but succeeds for breach of contract and the tort of wrongful appropriation of personality. However having regard to the paucity of evidence on the question of

damages, she receives JA\$1.00 in each successful action with costs against both defendants to be agreed or assessed.